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The crusade of transitional justice: tracing the journeys of hegemonic claims

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Engaging with Third World Approaches to International Law (TWAIL), this paper reviews the crusade of transitional justice by tracing the journeys of problematic claims across the world. Building on original empirical material, I document the dissemination of specific sets of claims as well as their hegemonic functions through a systematic review of the transitional justice provisions contained in all peace agreements signed since 1990. I centre on the epistemic violence¹⁴⁴ perpetuated through this normative crusade. The crusade and limitation of disseminated claims neglect the inevitable arguments about the past, frictions between legal 'global standards', the resulting technocratic practices and the often-silenced politicised negotiations taking place through transitional justice practices. Gradually, the consolidation of hegemonic approaches took over institutional debates addressing legacies of mass violence and, consequently, silencing certain types of violence. In other words, I argue that transitional justice is simultaneously: 1) an increasingly normative and technocratic field that claims to deal with legacies of violent pasts for democratic futures, 2) a set of processes that silences normative and discursive battles about a violent past and perpetuates epistemic violence.

In policy settings, transitional justice efforts are mostly perceived as tools to account for legacies of mass violence, to end authoritarianism and hence to contribute to liberal democracy. From post-colonial theoretical grounds, TWAIL clarifies the role of international law that sustains unequal structures and maintains the growing North-South divide¹⁴⁵ and historical association of international human rights law with colonial conquest and Western domination in Africa.¹⁴⁶ TWAIL also denounces contemporary ideology's assumption that liberal institutions and international human rights norms can tackle issues of abuse of power and authoritarianism. To quote Sripati, TWAIL is an intellectual endeavour that 'assails the creation and perpetuation of international law as a "racialised hierarchy" of international norms and institutions that subordinate the third world by the first world'.¹⁴⁷ The application of such a twailean perspective to transitional justice projects the image of an increasingly professionalised industry that deploys fact-finding, training and reporting activities that seek accountability and aim to provide reparations to victims, ultimately to achieve sustainable peace and democratisation to redress

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¹⁴⁴ Building on Dos Santos' concept of 'epistemicide' and Steve Biko's praxis of Black Consciousness, Madlingozi argues that the 'Global Transitional Justice Project (GTJP) is one of the most effective vehicles for the imposition of Western epistemologies and, conversely, the re-inferiorisation of 'non-Western' epistemologies and ways of being in the world; that is, a way of perpetuating epistemicide. The GTJP is, therefore, a key mechanism in buttressing the coloniality of power, knowledge and being. Understood in this way, in historically settler colonies the GTJP ultimately facilitates a transition from settler domination to settler hegemony.' See T. Madlingozi (2015), 'Transitional Justice as Epistemicide: on Steve Biko's Pluralist Co-existence "after" Conflict', Seminar, Wits Institute for Social and Economic Research, Witwatersrand University, 7 July.

¹⁴⁵ B. S. Chimni (2006), 'Third World Approaches to International Law: A Manifesto', *International Community Law Review*, 8:3.

¹⁴⁶ See, Madlingozi, 'Transitional Justice as Epistemicide'; M. Mutua (2000), 'Politics and Human Rights: An Essential Symbiosis', in M. Byers (2001), *The Role of Law in International Politics*, Oxford University Press, pp. 149–76; and M. Mutua (2001), 'Savages, Victims, and Saviors: The Metaphor of Human Rights', *Harvard International Law Journal*, 42:201.

¹⁴⁷ V. Sripati (2008), 'The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights', *International Community Law Review*, 10 (4): pp. 411–20.

conflict-affected or ‘broken’ societies.¹⁴⁸ In such technocratic interventions, the professional elites of transitional justice disseminate and consolidate a contentious normative framework that neglects (and hence reproduces) unequal power dynamics. From such perspectives, the transitional justice normative crusade enables token democracies to be consolidated and epistemic violence to be inflicted.

Consolidation of hegemonic packages: norms that inflict epistemic violence

The field of transitional justice emerged out of debates addressing how the Latin American and former Yugoslav countries experienced political transitions from authoritarian rule to democracy.¹⁴⁹ Over the last decades, the field was transformed from unsettled debates interrogating which approach would be best¹⁵⁰ to a hegemonic package standardising normative claims and routinising institutional practices.¹⁵¹ In order to trace the dissemination of transitional justice norms at a global scale, I reviewed all transitional justice provisions in the 1518 peace agreements signed between 1990 and 2015 in 80 countries, across 140 peace processes.¹⁵² Of these 1518, 760 agreements entail some form of commitment to deal with legacies of past violence. With an interest in institutional and normative claims, this paper narrows down its focus to the 102 agreements that provide for a non-judicial mechanism, i.e. providing for an institution of some sort to ‘deal with the past’.¹⁵³

The texts of peace agreements document how such ‘global’ standards get integrated into specific peace processes across the world, as illustrated in Graph 1. The flowers on the world map indicate the countries for which peace agreements contain transitional justice mechanisms commitments.¹⁵⁴ The 20 examples in lined-up boxes illustrate further the normative dissemination across space and time. Three key points stand out from the graph: (1) the geographic and chronological scale of transitional justice dissemination; (2) the direction of dissemination; (3) the similarities of the names of mechanisms. In contrast to literature that focuses on norms entrepreneurs that celebrates such dissemination,¹⁵⁵ I clarify here how the direction and the normative content of such a crusade are relevant to depict the epistemic violence emerging from such hegemonic and normative consolidation.

148 See V. Nesiiah (2016), ‘Theories of Transitional Justice: Cashing in the Blue Chips’, in A. Oford, F. Hoffman and M. Clark (2016), *The Oxford Handbook of the Theories of International Law*, Oxford University Press; T. Madlingozi (2010), ‘On Transitional Justice Entrepreneurs and the Production of Victims’, *Journal of Human Rights Practice*, 2 (2); and T. Madlingozi (2016), ‘Transitional Justice as Epistemicide: on Steve Biko’s Pluralist Co-existence “after” Conflict’, Conference Paper, ISA Annual Meeting, San Francisco.

149 See M. Albon (1995), ‘Truth and Justice: The Delicate Balance – Documentation of Prior Regimes and Individual Rights’, in N. Kritz (ed.) (1995), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press; and N. Kritz and N. Mandela (1995), ‘Country Studies’ in N. Kritz (ed.) (1995), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press.

150 R. Siegel (1998), ‘*Transitional Justice: A Decade of Debate and Experience*’, *Human Rights Quarterly*, 20 (2).

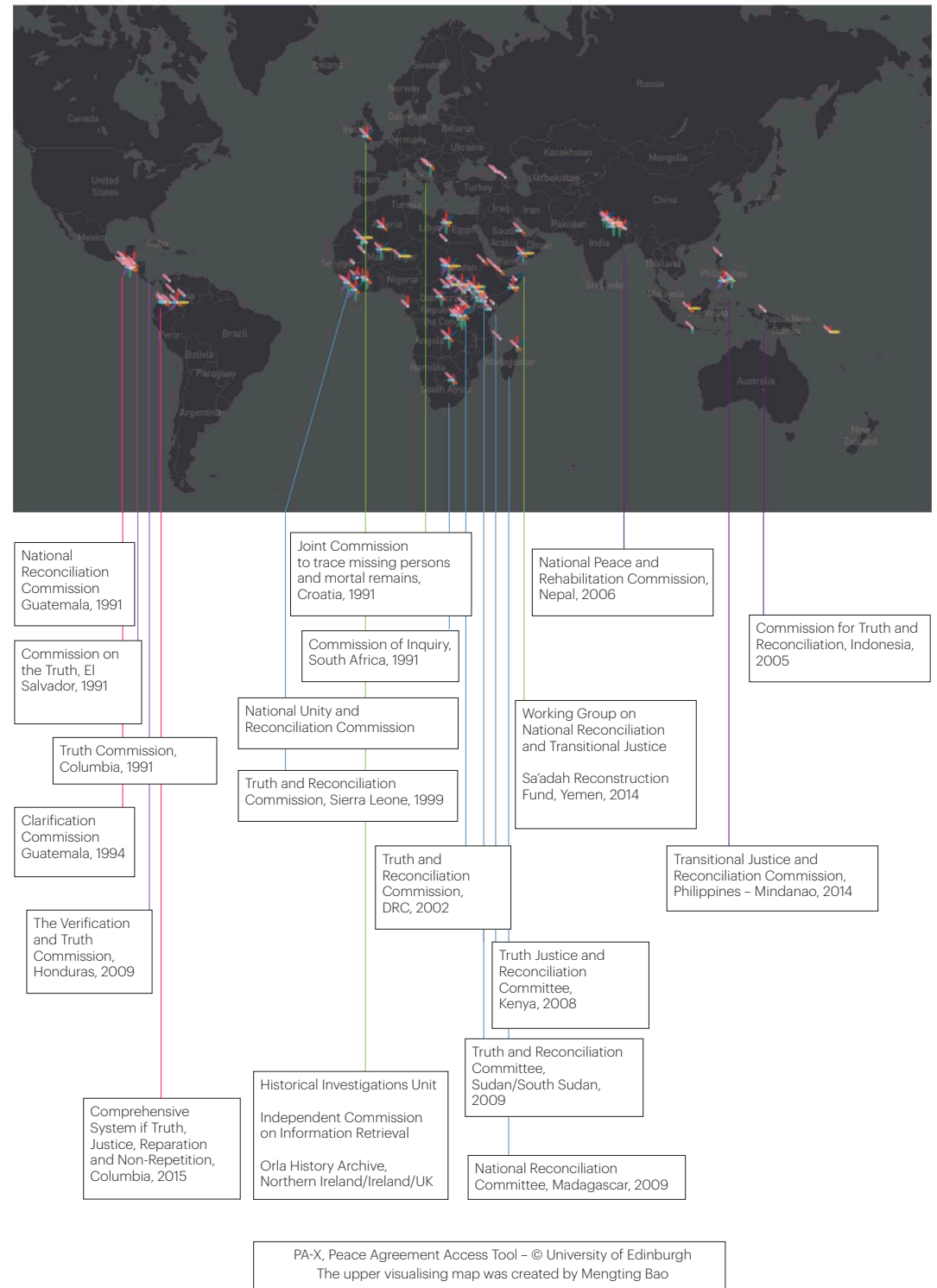
151 V. Nesiiah (2016), ‘Theories of Transitional Justice: Cashing in the Blue Chips’, in A. Oford, F. Hoffman and M. Clark (2016), *The Oxford Handbook of the Theories of International Law*, Oxford University Press

152 Using the provisions related to transitional justice mechanisms coded geographically and chronologically, I re-coded these provisions with further thematic sub-categories into Nvivo (a qualitative data analysis computer software). As a part of the team of the Political Settlements Research Programme, I was responsible for the transitional justice theme in the construction of PA-X. The peace agreement database is fully accessible: <<https://www.peaceagreements.org/>>

153 C. Bell, S. Badanjak, R. Forster, A. Jamar, J. Pospisil and L. Wise (2017), ‘PA-X Codebook, Version 1’, Political Settlements Research Programme, University of Edinburgh.

154 Each flower represents one agreement, some countries have several agreements containing transitional justice provisions, and hence several flowers.

155 Literature that celebrates the successful cascade of human rights norms e.g. M. Finnemore and K. Sikkink (1998), ‘International Norm Dynamics and Political Change’, *International Organization*, Vol. 52, No. 4: pp. 887–917.



Graph 1: World map of commitments to transitional justice mechanisms contained in peace agreements

The direction of transitional justice dissemination displays a geographic discrepancy towards the Global South.¹⁵⁶ Transitional justice commitments expand from Latin America (Guatemala, Salvador and Colombia) in the early 1990s to Europe (e.g. Bosnia and Herzegovina in 1992, Georgia – Abkhazia – Russia, and Croatia, Tajikistan and Kosovo in the late 1990s, and Northern Ireland in 2001 and 2003). After that, there is no transitional justice provision in any peace agreement related to a European country until 2014. On the African continent, the transitional mechanisms spread from South Africa to Mali, Rwanda, Somaliland, Burundi, Gabon, Niger, Uganda, Sierra Leone, Comoros, Eritrea-Ethiopia, DRC, etc. Africa became the continent with the most countries establishing transitional justice mechanisms. In the Middle East, peace agreements committed to establish similar mechanisms in Iraq in 2004, in Bahrain in 2011, and in Yemen in 2014. In the Asia and Pacific region, transitional justice mechanisms were introduced in Indonesia and the Solomon Islands in 2001, in the Philippines in 2002, in Sri Lanka in 2003, and in Nepal and Pakistan in 2006. Commenting on the historical discrepancy of human rights scrutiny and knowledge production being slanted towards the Third World, Okafor states: such a geographic trajectory ‘helps to foster a racialised hierarchy in which Third World societies are endemically and perpetually viewed as the sites of human rights violations’.¹⁵⁷ A clear parallel can be drawn for the direction of the normative dissemination: transitional justice commitments expanded from the endogenous appearance of transitional justice efforts in Latin American peripheries to a global hegemony which gradually disseminated to the East and mushroomed speedily and predominantly in Africa.

To clarify these normative commitments, I coded what peace agreements texts actually provide for in terms of the type of mechanism, the set aims, and the actions that allegedly connect such institutional frameworks with the aims set. The names of these mechanisms contain different combinations of the transitional justice global ‘toolkit’ and suggest an inherent complementarity between these elements (i.e. reconciliation, justice, healing, truth): National Unity and Reconciliation Commission (Sierra Leone, 1996), National Peace and Rehabilitation Commission (Nepal, 2006), Justice, Truth and Reconciliation Commission (Sudan, Darfur, 2011), National Reconciliation Commission (DRC, 2013), Commission for Truth, Reconciliation and Healing (South Sudan, 2014), Comprehensive Process for Reconciliation and Healing (Philippines, Mindanao, 2014), Transitional Justice and Reconciliation Commission (Philippines, Mindanao, 2014).

¹⁵⁶ The nature of the empirical evidence used to document such dissemination (peace agreements) increases such difference. Excluding all transitional justice institutions established outside of peace agreements also excludes several transitional justice mechanisms in Western countries. Transitional Justice in Balance, which draws on global databases, still projects a similar discrepancy (Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter (2010) *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, USIP Press).

¹⁵⁷ O. C. Okafor (2014), ‘International Human Rights Fact-Finding Praxis in Its Living Forms: A TWAIL Perspective’, *Transnational Human Rights Review*, 1:59.

Mechanism types		Actions		Aims	
Truth	44	Fact finding – investigate	71	For reconciliation	27
Inquiry	26	Produce report	19	For non-repetition	19
Reconciliation	9	Clarify events – history	16	To investigate events	9
Reparations	6	Compensate victims	9	To heal	8
Genocide prevention	3	Efforts to fight against impunity	8	For accountability	5
Tradition	3	Treat claims	8	For justice	5
Justice	2	Address human rights violations	7	To repair harm caused	5
Peace	1	Bring guilty to justice – punish	7	For rehabilitation	4
Gender	1	Qualify crimes	6	For forgiveness	3
		Truth-telling	6	For reparation	3
		Civic, peace and reconciliation education	4	For rule of law consolidation	2
		Apply vetting or sanctions	4	To end impunity	2
		Rehabilitate victims of genocide	3	For co-existence	1
		Work out a TJ programme	3	For institutional reforms	1
		Adopt legislation against genocide	2	For truth	1
		Organise consultations	2	To monitor society (prevention)	1
		Establish inter-ethnic front to resist genocide	2	To strengthen democracy	1
		Make public apology	2		
		Undertake regional monitoring for genocide prevention	2		
		Report events	2		
		Organise cleansing ritual	1		
		Fight against discrimination	1		
		Rewrite history	1		
		Assure the security of witnesses and victims	1		

Table 1: List and numbers of mechanism type, actions and aims included in peace agreements in relation to non-judicial (transitional justice) mechanisms

By listing the types of mechanisms, actions and aims in order of frequency, the table shows the most common elements: of 95 mechanisms, 44 are some form of truth commission (46%) and 26 are inquiry commissions (27%). In terms of specific actions, fact-finding and investigative activities are by far the most provided for in peace agreements (included in 71 peace agreements). The production of a report (in 19 agreements) and efforts to clarify events related to past violence (in 16 agreements) are also relatively frequent. The texts of peace agreements relate these different institutions and activities to various aims, most importantly to reconciliation and non-repetition. The provisions for other forms of institutions or activities exist but are much less frequent, as illustrated by the numbers at the lower ends of these three lists. Another noticeable element is the lack of articulations of how these institutions should achieve the set aims. On the contrary, the dissemination of such similar approaches consolidates contested claims: fact-finding, investigations or the production of reports would lead to reconciliation or non-repetition.

While the complementarity between different elements of transitional justice is increasingly contested,¹⁵⁸ extensive research criticises the field of transitional justice for the claimed benefits attached to truth-seeking initiatives, its reconciling, healing or preventive functions.¹⁵⁹ Such institutional practices have also been criticised for favouring specific accounts of violence while silencing others.¹⁶⁰ Denouncing the hegemonic functions of transitional justice, Nesiah observes that ‘assumptions are normalised and institutional practices routinised in ways that have consolidated rather than troubled the field’, instead of being challenged, revisited or defined.¹⁶¹ For Madlingozi, the normative dimension of such hegemonic packages is ‘one of the most effective vehicles for the imposition of western epistemologies, and, conversely, the re-inferiorisation of “non-western” epistemologies and ways of being in the world; that is, a way of perpetuating epistemicide’.¹⁶² Similarly, this global review of transitional justice commitments draws attention to the hegemonic functions of such normative and geographic dissemination. Instead of a celebratory normative cascade, I depict a normative crusade that consolidated contested normative claims and disseminated them across the Global South. In other words, transitional expertise brought in peace mediation contributed to the production of such normative knowledge. On a global scale, this inflicts epistemic violence by silencing necessary, politically difficult and unsettled debates to address legacies of mass violence.

It is crucial to read such observations with the implementation of transitional justice efforts in specific contexts to grasp the political functions of the normative package. As argued elsewhere,¹⁶³ the Burundian and Rwandan cases present contexts where ambitious transitional justice agendas

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- 158 See P. Naftali (2015), ‘The Politics of Truth: On Legal Fetishism and the Rhetoric of Complementarity’, *Revue Québécoise de Droit International*, Special Education Review, 101; B. A. Leebaw (2008), ‘The Irreconcilable Goals of Transitional Justice’, *Human Rights Quarterly*, 30 (1); S. Lefranc and G. Mouralis (2014), ‘De Quel(s) Droit(s) la Justice Internationale est-elle Faite? Deux Moments de la Constitution Hésitante d’une Justice de l’après-Conflit’, *La Nouvelle Revue des Sciences Sociales*, No.3; K. McEvoy (2018), ‘Travel, Dilemmas and Nonrecurrence: Observations on the “Respectabilisation” of Transnational Justice’, *International Journal of Transitional Justice*, 12 (2), pp. 185–93.
- 159 See L. Fletcher and H. Weinstein (2002), ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, *Human Rights Quarterly*, 24 (3); D. Mendeloff (2004), ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’, *International Studies Review*, 6 (3); R. Shaw (2005), *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace, Special Report, No. 130; J. E. Burnet (2009), ‘Whose Genocide? Whose Truth, Representations of Victim and Perpetrator in Rwanda’, in A.L. Hinton and K.L. O’Neill (eds) *Genocide: Truth, Memory and Representation*, Duke University Press; B. M. French (2009), ‘Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony’, *Journal of Human Rights*, 8 (1), pp. 92–109; and F. C. Ross (2003), ‘On Having a Voice and Being Heard: Some after-Effects of Testifying before the South African Truth and Reconciliation Commission’, *Anthropological Theory*, 3 (3).
- 160 See Fletcher and Weinstein, ‘Violence and Social Repair’; Mendeloff, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding’; J. N. Clark (2008), ‘The Three Rs: Redistributive Justice, Restorative Justice, and Reconciliation’, *Contemporary Justice Review*, 11 (4); Nesiah, ‘Theories of Transitional Justice’; T. Madlingozi (2010), ‘On Transitional Justice Entrepreneurs and the Production of Victims’, *Journal of Human Rights Practice*, 2 (2); and P. Naftali (2017), ‘La Construction “Du Droit à la Vérité” En Droit International’, Bruylant.
- 161 Nesiah, ‘Theories of Transitional Justice’.
- 162 Madlingozi, ‘Transitional Justice as Epistemicide’.
- 163 See A. Jamar (2014), ‘Training in Transitional Justice in Rwanda and Burundi’, *L’Afrique Des Grands Lacs, Annuaire 2013–14*, L’Harmattan; A. Jamar (2016), ‘The Social Life of Policy Reports: Reporting as Tool for the Transitional Justice Battlefield’, Pending Review; A. Jamar (2016), ‘Transitional Justice Battlefield – Practitioners Working around Policy and Practice in Burundi and Rwanda’, PhD Dissertation in International Development, University of Sussex; and A. Jamar (2018), ‘Victims’ Inclusion and Transitional Justice: Attending to the Exclusivity of Inclusion Politics’, PSRP Report, Transitional Justice Series.

have been promoted. These two neighbouring nations of the African Great Lakes region are still evolving towards authoritarianism. Such transitional justice efforts, or technocratic interventions, are not just taking place within a general context of token democratic practices (i.e. organisation of elections, referendums, participatory reforms for good governance, etc.) that consolidate authoritarianism. These two transitional justice processes also entailed inclusive and participatory dimensions to seek stronger legitimacy and increase their own democratic appearance (i.e. involvement of lay judges and community participation in Gacaca procedures in Rwanda, national consultations in Burundi). In the two cases, extensive political battles took place between and within the various national and international organisations involved in the two processes when framing the meta-narrative about violence. Additionally, technocratic battles have been taking place through disagreements over the mandate and procedures of Gacaca Law or the legal framework of the Truth and Reconciliation Commission in Burundi, on top of the political arguments over their implementation. All these battles have been silenced through references to the normative and technocratic dimensions of transitional justice.

In short, transitional justice efforts adopt a technocratic discourse that silences other voices and inherent political battles while diverting attention from contemporary use of violence and oppression towards political opponents. As demonstrated by tracing the transitional justice crusade, the required expertise and epistemic hegemony contributes to structural violence as 1) it reproduces inequalities and injustices without addressing core structural issues related to perpetuated violence; 2) it creates impunity for global (essentially Western) contributions to the consequences of authoritarianism and/or mass violence under scrutiny by transitional justice efforts; 3) it depoliticises efforts dealing with the past and hence creates ideal hooks for political manipulation by both global and domestic factors; 4) it continues to project a vision of the world where the North is portrayed as an international saviour and the Global South depicted as home to broken societies. Simply put, rather than consolidating liberal democracies, the crusade of transitional justice produces epistemic violence through the consolidation of elite cohorts and pre-formatted technocratic solutions to 'broken societies'